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FILED
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SUPREME COURT, U.S.

No. 98-488

In the Supreme Court of the United States

OCTOBER TERM, 1998

JULIAN R. MCDERMOTT AND CAROL L. MCDERMOTT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners made a timely request for refund of their 1987 taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A10 - A11) is unpublished, but the decision is noted at 141 F.3d 1149 (Table). The opinion of the district court (Pet. App. A2 - A8) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A9) was entered on March 18. The petition for a writ of certiorari was filed on June 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were married in 1967 and divorced in 1991 (Pet. App. A2-A3). On April 11, 1988, petitioners jointly filed an application to extend the time to file their 1987 income tax return. On August 15, 1988, they jointly filed an application for an additional extension of time to file until October 15, 1988. The Internal Revenue Service granted both requests for extension (*id.* at A3). On some date after October 15, 1988, petitioners eventually filed a joint 1987 federal income tax return on which they reported a tax liability of $6078 and payments of $13,118. On that return, petitioners claimed a refund due to them of $7040.55 (*ibid.*).

The Internal Revenue Service denied the refund claim as untimely, however, because the Service did not receive the return until December 1991—which was more than three years after the tax for 1987 was paid (Pet. App. A4).[1] Petitioners thereupon filed this suit for a refund of $7040.55 (*ibid.*).

2. a. Petitioners asserted that their refund claim was timely because their return was first sent to the Service by ordinary mail in late 1988 or early 1989 (Pet. App. A3). The Service, however, has no record of receiving such a return. Indeed, the Service's records show that in January 1991 the agency advised petitioners that it had not received a 1987 return and that any refund associated with that year could be claimed

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[1] All payments of tax by petitioners for 1987 were deemed to have been made on April 15, 1988. See 26 U.S.C. 6513. Because petitioners obtained extensions of time to file their 1987 return until October 15, 1988, they had until October 15, 1991, in which to file a timely claim for refund of tax for 1987. See 26 U.S.C. 6511(b)(2)(A).

only if petitioners promptly filed a timely 1987 return (*ibid.*).

Petitioner Julian McDermott testified in a deposition that, upon receipt of this letter, he mailed the Service a copy of the 1987 return that he claimed he had mailed two years before (Pet. App. A3). He further testified that approximately six months later, when he had still received no refund for 1987, he contacted the IRS and was instructed to send copies of the 1987 return to two different addresses (*ibid.*). The IRS records reveal, however, that the agency did not receive petitioners' 1987 tax return until December 9, 1991—which was 55 days after the statutory deadline for claiming a refund for the 1987 tax year (*id.* at A4). See note 1, *supra*. The IRS thereafter acknowledged receipt of the 1987 return. Because the return had not been signed, however, the agency requested petitioners to sign and return a declaration (*id.* at A3), which they did (*ibid.*). The associated refund claim was thereafter denied because it was untimely (*id.* at A4).

b. The district court granted summary judgment to the United States. The court concluded that petitioners' claim for refund was barred by 26 U.S.C. 6511(a) and (b)(2)(A) because petitioners failed to establish that they filed their return for 1987 no later than October 15, 1991 (Pet. App. A2, A5).

The government's motion for summary judgment was accompanied by (i) the Certificate of Assessments and Payments that reflected the status of petitioners' account for the 1987 tax year, (ii) the deposition of petitioner Julian McDermott and (iii) the declaration of Carol McDermott that she had no recollection of the circumstances surrounding the filing of any 1987 joint federal income tax return (see Pet. App. A8). The evidence on which petitioners sought to rely included (i)

the testimony of Julian McDermott that he had placed the return in the ordinary mail in a timely manner and (ii) the divorce agreement drafted for petitioners in October 1991, which contained a reference to the anticipated tax refund for 1987 (see id. at A7).

Viewing the facts in the light most favorable to the petitioners, the district court concluded that the return was not timely filed (Pet. App. A2, A7-A8). The court noted that, under this Court's decision in *United States* v. *Lombardo*, 241 U.S. 73, 76 (1916), a document is not deemed filed with the United States until the date that it is actually received (Pet. App. A6). The district court recognized that, under the exception to that rule provided by the "statutory mailbox rule" in 26 U.S.C. 7502, "tax returns and claims received after a filing date [are deemed] to have been delivered on the date of the postmark stamped on the cover in which the return is mailed" (Pet. App. A6). The court observed that the courts of appeals have expressed different views as to the nature of the evidence required to prove the existence of a postmark under this statute: the Second and Sixth Circuits have disallowed the use of extrinsic evidence (other than the postmarked envelope itself) to prove when a return was mailed; the Eighth and Ninth Circuits have allowed carefully delineated types of extrinsic evidence. The district court concluded, however, that even under the more expansive interpretation of the statute adopted by the Eighth and Ninth Circuits, the uncorroborated testimony of a taxpayer that he placed the document in the ordinary mail is insufficient to satisfy the statutory mailbox rule of 26 U.S.C. 7502 (Pet. App. A6-A8). Because petitioners' return was not actually filed until after the statutory period of limitations had expired, the court held that petitioners were not entitled to a refund.

3. The court of appeals affirmed (Pet. App. A10-A11). The court held that, to counter the government's proof that it did not receive the return in a timely fashion, petitioners "w[ere] required to adduce specific facts which could reasonably support a decision in [their] favor" and that they failed "to discharge this obligation" (*id.* at A11).

ARGUMENT

The courts of appeals have adopted conflicting interpretations of Section 7502 of the Internal Revenue Code. These different interpretations have produced disparate results on the same basic facts. The proper application of the rules concerning the timely filing of documents with the Internal Revenue Service is a recurring matter of substantial importance to the administration of the tax laws—for those rules frequently determine the substantive outcome of tax disputes. Resolution of this recurring issue by this Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws. But, the facts of the present case do not present the particular issue on which the courts of appeals have disagreed. Further review of the decision in this case is therefore not warranted.

1. a. The Internal Revenue Code contains numerous filing requirements that specify a time by which the filing must be made. The consequences of a failure to make a timely filing are often significant. For example, as relevant here, Section 6511(a) of the Code provides that any claim for refund of an overpayment of tax must be filed within three years from the time a return was filed or two years from the time the tax was paid, whichever period expires later, or if no return was filed, within two years from the time the tax was paid. 26

U.S.C. 6511(a). Under Section 6511(b)(1), a refund may not be made unless a claim is filed within the period specified in Section 6511(a). 26 U.S.C. 6511(b)(1). Moreover, Section 6511(b)(2)(A) limits the amount of any permissible refund to the amount of such taxes paid within the three-year period immediately preceding the filing of the claim (plus the period of any approved extensions of time to file).[2] Under these provisions, petitioners therefore had until October 15, 1991, within which to file a claim for refund of their 1987 taxes. See note 1, *supra*.

Prior to the enactment of Section 7502 of the Internal Revenue Code in 1954, it was well established that a statutory filing requirement could be satisfied only if the document was both actually and timely received by the "particular officer" specified in the statute. *United States* v. *Lombardo*, 241 U.S. at 78. This requirement has been known as the "physical delivery" rule. See *Anderson* v. *United States*, 966 F.2d 487, 490 (9th Cir. 1992). In *United States* v. *Lombardo*, this Court rejected the contention that "the requirement of a statute * * * that a paper shall be filed with a particular officer, [may be] satisfied by a deposit in the post office at some distant place" (241 U.S. at 78). The Court explained that (*ibid.*):

> [t]o so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files.

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[2] A federal income tax return that shows an overpayment of taxes is treated as a claim for refund. Treas. Reg. 301.6402-3(a)(5).

The Court further stated that (*id.* at 76-77) (quoting with approval the decision below in that case; citations omitted):

> Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. * * * A paper is filed when it is delivered to the proper official and by him received and filed. * * * Anything short of delivery would leave the filing a disputable fact * * *.

Under this "physical delivery" rule, a document that was timely mailed but not timely received was not to be treated as having been timely filed. *Phinney* v. *Bank of Southwest Nat'l Ass'n*, 335 F.2d 266, 268 (5th Cir. 1964). Prior to the enactment of Section 7502, however, some courts had departed from the requirement of proof of "physical delivery" by holding that proof of "due mailing is prima facie evidence of receipt" that may be rebutted by actual evidence of non-receipt (*Crude Oil Corp.* v. *Commissioner*, 161 F.2d 809, 810 (10th Cir. 1947); see *Arkansas Motor Coaches, Ltd.* v. *Commissioner*, 198 F.2d 189, 191 (8th Cir. 1952)). In *Phinney* v. *Bank of Southwest National Ass'n*, 335 F.2d at 268, however, the court noted that, under this Court's decision in *United States* v. *Lombardo*, *supra*, "[m]ailing is not filing."

Against this background, Congress enacted Section 7502 in 1954 to address concerns about the effect of irregularities in postal delivery on the filing of tax documents. H.R. Rep. No. 1337, 83d Cong., 2d Sess., A434-A435 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 615 (1954); *Emmons* v. *Commissioner*, 898 F.2d 50, 51 (5th Cir. 1990); *Miller* v. *United States*, 784 F.2d 728,

730 (6th Cir. 1986); *Sylvan* v. *Commissioner*, 65 T.C. 548, 551 (1975). Section 7502 provides two statutory exceptions to the "physical delivery" rule:

(i) Section 7502(a) addresses the requirement that the document be received in a timely manner. It applies when a document has been "delivered by United States mail" to the IRS on a date "after" it was due (26 U.S.C. 7502(a)(1)) and specifies that a document thus delivered shall be deemed to have been filed with the IRS on "the date of the United States postmark stamped on the cover" of the mailing envelope (*ibid.*). By its terms, Section 7502(a)(1) applies only when the document has been "delivered by United States mail" to the IRS. *Ibid.* The risk that "United States mail" may *not* be "delivered" thus remains on the taxpayer under Section 7502(a)(1).

(ii) Section 7502(c), however, provides a method for the taxpayer to guard against that risk. It provides that, if a tax document is "sent by United States registered mail," a receipt for the registration is to be treated as "prima facie evidence that the * * * document was delivered" to the office to which it was addressed. 26 U.S.C. 7502(c)(1)(A). The statute further provides that the date of registration shall be treated as the "postmark date" of the registered mail (26 U.S.C. 7502(c)(1)(B)) and is thus to be "deemed to be the date of delivery" (26 U.S.C. 7502(a)(1)). Any taxpayer may thus avoid the risk of non-delivery of ordinary mail simply by making use of registered mail and the provisions of Section 7502(c)(1).[3]

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[3] Pursuant to 26 U.S.C. 7502(c)(2) and 26 C.F.R. 301.7502-1(c)(iii)(*b*)(2), the same provisions applicable to registered mail have been made available for documents sent by certified mail.

b. In the present case, petitioners do not contend that the return actually received by the IRS on December 9, 1991, was "delivered by United States mail to the agency [IRS]" with a "postmark stamped on the cover" of the mailing envelope that was dated before October 15, 1991, when the refund claim was due (26 U.S.C. 7502(a)(1)). Instead, petitioners claim that, on an earlier date, they mailed a 1987 tax return to the IRS which the agency did not receive. In support of that contention, they offered the testimony of petitioner Julian McDermott, who claimed to have mailed a return for 1987 on prior dates. Because those alleged mailings were not "delivered by United States mail to the agency" with a "postmark stamped on the cover" of the mailing envelope, the courts below correctly concluded that the statutory exceptions of Section 7502 to the physical delivery rule are not applicable to this case and that petitioners' belated request for a refund of taxes is therefore untimely.

2. The decision of the First Circuit in this case is consistent with the prior decisions of the Sixth Circuit in *Miller* v. *United States*, 784 F.2d 728 (1986), and *Surowka* v. *United States*, 909 F.2d 148 (1990). In those decisions, as here, the court held that Section 7502 "provides only two exceptions to the physical delivery rule for the filing of tax returns and that a taxpayer cannot invoke the judicially-created presumption that properly mailed material is received." 909 F.2d at 148; 784 F.2d at 730. Accord, *Carroll* v. *Commissioner*, 71 F.3d 1228, 1232-1233 (6th Cir. 1995), cert. denied, 518 U.S. 1017 (1996).

The decision in this case is also consistent with the decisions of the Second Circuit in *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (1979), cert. denied, 444 U.S. 1015 (1980), and *Washton* v. *United States*, 13 F.3d 49,

50 (1993), in which that court emphasized that the document "must actually be 'delivered by United States mail' to the IRS, not merely placed in a regular United States mail receptacle" (*ibid.*, quoting 26 U.S.C. 7502(a)(1)).[4] The Second Circuit, like the Sixth Circuit, has expressly rejected the contentions (i) that evidence of "a timely mailing of a return [by ordinary mail] constitutes a timely filing" (13 F.3d at 50) and (ii) that evidence of such mailing can suffice to establish the statutory requirement that the document be "actually delivered" (599 F.2d at 46).

If the fact that a document had been sent by ordinary mail were sufficient to create a presumption of delivery, Section 7502(c) of the Code would be "strip[ped] * * * of its purpose." *Estate of Wood* v. *Commissioner*, 909 F.2d 1155, 1163 (8th Cir. 1990) (Lay, C.J., dissenting). There obviously would have been no need for Congress to provide that use of "registered" mail constitutes "prima facie evidence of delivery" under the detailed provisions of Section 7502(c)(1) if the use of ordinary mail were silently entitled to the same presumption. Such an interpretation of Section 7502 would not only be inconsistent with the "physical delivery" rule that preceded enactment of Section 7502 (see pages 6-7, *supra*), it would deprive Section 7502(c) of any rational meaning. The express creation of a presumption of delivery only for documents sent by registered or certified mail under Section 7502(c) negates the con-

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[4] Accord, *H.S. & H. Ltd.* v. *United States*, 18 Cl. Ct. 241, 246 (1989) ("The exceptions by which a taxpayer may prove timely filing when mailed are exclusively and completely outlined in § 7502."); *United States* v. *Cope*, 680 F. Supp. 912, 917 (W.D. Ky. 1987) ("The only two exceptions to the * * * physical delivery rule are contained in § 7502.").

tention that such a presumption may also apply when tax documents are sent by regular mail.

3. As the court of appeals recognized in this case (Pet. App. A6-A7), however, these decisions of the Second and Sixth Circuits conflict with decisions of the Eighth and Ninth Circuits.

a. In *Estate of Wood* v. *Commissioner*, the Eighth Circuit concluded that "[t]here is no reason that a presumption of delivery should not apply against the Commissioner under section 7502." 909 F.2d at 1159. The court noted that, prior to the enactment of Section 7502, the common law presumption of delivery that arises from proof of mailing had been applied in some cases involving statutory filing requirements for tax documents (see page 7, *supra*). The court reasoned that neither the history nor text of Section 7502 reflects that Congress desired "to completely displace the common law presumption of delivery" (909 F.2d at 1160).

The court in *Estate of Wood* did not, however, adopt the rule that evidence of mailing would create a presumption of delivery under Section 7502. Indeed, the court stated that "mere evidence of mailing" would not support a presumption of delivery (909 F.2d at 1161). The court stated that the text of Section 7502 reveals that "[t]he act of mailing is not significant for purposes of the statute but placement of a postmark is" (*ibid.*). The court opined that (*ibid.*)

> in section 7502 Congress dealt with issues of proof, and determined that a postmark is evidence verifiable beyond any self-serving testimony of a taxpayer who claims that a document was timely mailed.

The court held that "only direct proof of postmark * * * will satisfy the requirements of the act" and concluded that, when such "direct proof of postmark" exists, it establishes "a presumption of delivery, which is rebuttable by the Commissioner." *Ibid.*[5] In what it admitted was an "extraordinarily rare" case, the Eighth Circuit determined that taxpayer was able to meet its burden in the form of testimony by the postmistress of a small town who remembered affixing postage to and hand-canceling the specific envelope in question on the specific date alleged by the taxpayer (*id.* at 1157, 1161). Because the Commissioner had failed to provide "any positive evidence" to support the assertion that "he did not receive the return" (*id.* at 1157), the court concluded on the record of that case that the presumption of delivery had not been rebutted (*ibid.*).

b. In *Anderson* v. *United States*, 966 F.2d at 490-491, the Ninth Circuit expressly adopted the rationale of *Estate of Wood* and expressly rejected the contrary decisions of the Second and Sixth Circuits in *Deutsch* and *Miller*. The court concluded in *Anderson* that the requisite "direct evidence" of a timely postmark required by *Estate of Wood* could be based on a taxpayer's assertion that "she actually saw the postal clerk stamp her document" (966 F.2d at 491). The court further held in *Anderson* that the "rebuttable presumption" of delivery created by "direct proof of a timely postmark" was not rebutted merely by the government's official "records of non-receipt." *Id.* at 491-492. The court held that such official evidence did

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[5] As Chief Judge Lay pointed out in his dissent in *Estate of Wood* v. *Commissioner*, 909 F.2d at 1162, however, "the plain language of the statute relegates the postmark to irrelevancy if the document is not delivered."

not rebut the presumption of delivery because the government had acknowledged that some "tax documents that had been mailed and delivered" to the Service were thereafter lost (*id.* at 492).

In *Lewis* v. *United States*, 144 F.3d 1220 (1998), the Ninth Circuit addressed this same issue in the context of an attorneys fee award under 26 U.S.C. 7430. In a split decision (Justice White, dissenting), that court interpreted the *Anderson* case as establishing the principle that, "if a taxpayer furnishes credible evidence of the date her letter to the Service was postmarked, the date is the date that controls." 144 F.3d at 1223. The court concluded that the taxpayers met that standard in that case (i) by presenting the testimony of the taxpayer that he mailed the document in question on the date that it was due and, on the same date, mailed a similar document to the State of California and (ii) by placing into evidence three signed checks issued on the due date, two of which were payable to and received by the IRS and one of which was payable to the State of California and cashed by the State on the following day. *Ibid.* The court reasoned that, because the Service had lost the envelope in which the document had been mailed, the agency (rather than the taxpayer) should bear any adverse inference to be drawn. *Id.* at 1222-1223. Justice White dissented, reasoning that *Anderson* should not be read to allow the testimony of the taxpayer to provide direct proof of a timely postmark. *Id.* at 1225.

4. Although these courts of appeals have reached conflicting interpretations of Section 7502, the present case is not an adequate vehicle for resolution of that conflict. This is because, under any of the conflicting interpretations of Section 7502, petitioners would not prevail on the facts of this case.

In both *Estate of Wood* and *Anderson*, the courts concluded that a presumption of delivery could arise under Section 7502(a) if there was "direct proof of postmark" (909 F.2d at 1161; 966 F.2d at 491). In the present case, however, petitioners offered no direct proof of postmark. Instead, we have essentially "the uncorroborated testimony of [petitioner Julian McDermott] who himself was unsure of the date of mailing" (Pet. App. A7). In similar circumstances, the Second Circuit in *Washton* reached the same conclusion reached by the court of appeals here and, in doing so, pointed out that the same conclusion would also have been reached in *Estate of Wood* and in *Anderson* because "[t]he taxpayers here offer[ed] no evidence beyond their own statement that they mailed the return." 13 F.3d at 50. Even under the analysis applied by the Eighth Circuit in *Estate of Wood*—and adopted by the Ninth Circuit in *Anderson*—such "mere evidence of mailing" is not a sufficient basis for a presumption of delivery to arise under Section 7502. *Estate of Wood* v. *Commissioner*, 909 F.2d at 1161; see also *Grable* v. *IRS*, 188 B.R. 595, 596 (Bankr. W.D. Mo. 1995). The *Lewis* case also does not aid petitioners because they offer no proof of the date of mailing.

Although a clear conflict exists among the decisions of the circuits that have interpreted Section 7502, resolution of that conflict would not affect the disposition of the present case. Under the view of all of the appellate courts that have thus far addressed this issue, the evidence offered in this case would not provide a sufficient basis for petitioners to prevail under the statute.[6]

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[6] One of the issues raised by petitioners (Pet. 18) is whether an IRS Certificate of Assessments and Payments (Form 4340) is

The present case thus does not present the precise issue on which the circuits have divided. Further review of the decision in this case therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1998

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entitled to a presumption of correctness. Petitioners did not, however, address that issue in their brief in the court of appeals. They have thus waived the issue. *Simmons* v. *City of Philadelphia*, 947 F. 2d 1042, 1065 (3d Cir. 1991), cert. denied, 503 U.S. 985 (1992). The attack on the validity of the Form 4340 is, in any event, without merit. The Form 4340 is generated under seal and signed by an IRS officer. It is admissible into evidence as an official record of the United States and carries a presumption of correctness. *Hughes* v. *United States*, 953 F. 2d 531, 535 (9th Cir. 1992).